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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

DILLINGHAM CONSTRUCTION, N.A.,
INC.,

Cross-complainant and Respondent,

v.

ARGONAUT CONSTRUCTORS,

Cross-defendant and Appellant.

A097736

(Sonoma County
Super. Ct. No. 220440 (Consolidated))

Argonaut Constructors purports to appeal from a November 6, 2001, judgment entered against it in favor of Dillingham Construction, N.A., Inc. Upon review of the record, this court asked the parties to submit supplemental letter briefs addressing the timeliness of the notice of appeal. We now conclude that the notice of appeal was untimely filed and therefore, the appeal must be dismissed.

FACTS

On November 5, 2001, the superior court judge signed the judgment under review. On the next day, the court clerk served a copy of the judgment endorsed filed November 6, 2001, on Argonaut's counsel by mail, with an attached proof of service showing the document was mailed on November 6, 2001. Thereafter, on November 27, 2001, Dillingham's counsel served a document entitled "Notice of Entry of Judgment," on Argonaut's counsel by mail. Attached to the document served on November 27, 2001 were: a page stating that the judgment was entered on November 6, 2001; a copy of the judgment endorsed filed November 6, 2001; and the court clerk's proof of service attached

to the judgment. After filing the notice of entry of judgment in court on November 30, 2001, Dillingham's counsel sent a copy of the file-stamped document to Argonaut's counsel by mail on December 11, 2001. Argonaut's notice of appeal was not filed until January 29, 2002.

DISCUSSION

Under the 2001 version of California Rules of Court,¹ rule 2(a),² a party was required to file a notice of appeal “on or before *the earliest of the following dates*: (1) 60 days after the date of mailing by the clerk of the court of a document entitled ‘notice of entry’ of judgment; (2) 60 days after the date of service of a document entitled ‘notice of entry’ of judgment by any party upon the party filing the notice of appeal, or by the party filing the notice of appeal; or (3) 180 days after the date of entry of the judgment. For purposes of this subdivision, a file-stamped copy of the judgment may be used in place of the document entitled ‘notice of entry’.” (Italics added.) Thus, “[t]he 60-day time period is triggered at the ‘earliest’ by the *service* of the document which notifies the parties that the judgment has been signed.” (*Filipescu v. California Housing Finance Agency* (1995) 41 Cal.App.4th 738, 742; italics added.)

As noted, the court clerk served the file-stamped copy of the judgment on November 6, 2001. Because the 60th day after November 6, 2001, was January 5, 2002, a Saturday, Argonaut had until Monday, January 7, 2002, to file a notice of appeal. (Rule 2(a)(1); Code Civ. Proc., §§ 10, 12, 12a.) Thus, the January 29, 2002, notice of appeal, was untimely.

Argonaut argues that we should not use November 6, 2001, as the starting date of the 60-day period for filing the notice of appeal because its counsel does not have any proof of service of the judgment from the court. However, that counsel does not have a copy of the proof of service is not relevant. The documents submitted by Argonaut

¹ All future references to a rule are to the California Rules of Court.

² Rule 2 was revised in 2002. Although the text was changed significantly, the revised 2(a) is substantively the same as the 2001 version.

establish that the superior court clerk did serve a copy of the file-stamped judgment by mail, with an accompanying proof of service showing the document was mailed to Argonaut's counsel on November 6, 2001.³ (*Sharp v. Pacific R. R. Co.* (1992) 8 Cal.App.4th 357, 360 [60-day period for filing notice of appeal commenced even though appellant never received mailed notice of entry of judgment].)

Assuming for the sake of argument Argonaut could successfully challenge the court's mailing, its January 29, 2002, notice of appeal would still be untimely. The next service of the document notifying Argonaut that the judgment had been signed occurred on November 27, 2001, when Dillingham mailed its notice of entry of judgment to Argonaut's counsel, with an attached proof of service.⁴ Because the 60th day after November 27, 2001, was January 26, 2002, a Saturday, Argonaut would have had until Monday, January 28, 2002, to file a notice of appeal. (Cal. Rules of Court, rule 2(a)(2); Code Civ. Proc., §§ 10, 12, 12a.) Thus, the notice of appeal filed on January 29, 2002, would have been one day late.

In its notice of appeal, Argonaut conceded that the "Notice of Entry of Judgment was served by mail by . . . Dillingham . . . on November 27, 2001." However, Argonaut now argues that November 27, 2001, was the date on which Dillingham served a courtesy copy of a "proposed" Notice of Entry of Judgment, which was not filed with the court until November 30, 2001. Consequently, Argonaut contends that its time to file its notice of appeal did not start until December 11, 2001, the date on which Dillingham mailed a copy

³ Under the 2001 version of rule 2(a)(1), there was no requirement that the clerk indicate the date he or she mailed a notice of entry of judgment or a file-stamped copy of the judgment. As of January 1, 2002, rule 2(a)(1) now requires that when the clerk serves a notice of entry of judgment or a file-stamped copy of the judgment, he or she show the date on which the document was mailed.

⁴ Under the 2001 version of rule 2(a)(2), there was no specific mention of the requirement, which is set forth in Rule 40, that a party's service of a notice of entry of judgment or a file-stamped copy of the judgment be accompanied by a proof of service. However, as of January 1, 2002, rule 2(a)(2) reiterates the requirement that a party's service of a notice of entry of judgment or file-stamped copy of the judgment be accompanied by proof of service.

of the file-stamped notice of entry of judgment to Argonaut’s counsel. However, it is the *service* of the notice of entry of judgment, not its *filing* with the court or *subsequent mailing* of a file-stamped copy, that would commence the 60-day time period to file the notice of appeal. (*Ramon v. Aerospace Corp.* (1996) 50 Cal.App.4th 1233, 1238-1239; *Filipescu v. California Housing Finance Agency*, *supra*, 41 Cal.App.4th at pp. 740-742; *Casado v. Sedgwick, Detert, Moran & Arnold* (1994) 22 Cal.App.4th 1284, 1286.) “[R]ule 2(a) explicitly states that the time for filing the notice of appeal is ‘60 days after the date of service of a document entitled “notice of entry”’ Rule 2(a) does not provide that the 60-day time period runs from the date of filing of th[at] document [or the subsequent mailing of the filed document]. In fact, rule 2(a) does not even mention the necessity of filing the document which contains the language ‘ “notice of entry”’ ” (*Casado v. Sedgwick, Detert, Moran & Arnold*, *supra*, 22 Cal.App.4th at p. 1286.)

In conclusion, because Argonaut has not shown it filed a timely notice of appeal, this court is without jurisdiction to consider its appeal on the merits and the appeal must be dismissed. (*Hollister Convalescent Hosp., Inc. v. Rico* (1975) 15 Cal.3d 660, 665-675.)

DISPOSITION

The appeal is dismissed. Each party to bear its own costs on appeal.

McGuiness, P.J.

We concur:

Parrilli, J.

Pollak, J.